NO. 84580-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

Robert BREITUNG,

Respondent.

BRIEF OF *AMICUS CURIAE*
WASHINGTON DEFENDER ASSOCIATION

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I. INTRODUCTION

Just two years ago, the Washington State legislature repealed a 1911 statute prohibiting noncitizens from possessing a firearm without a license and replacing it with a scheme permitting all lawful permanent residents to possess a firearm on equal footing with U.S. citizens. But although Washington treats noncitizens and lawful residents identically for purposes of their right to bear arms, the consequences for a lawful resident who is convicted of unlawfully possessing a firearm can often include deportation and permanent exile from their family and the place they consider home. The warnings required by law to be given to all defendants regarding the loss of the right to bear arms therefore carry special weight for noncitizens.

On the merits, the Due Process Clause has provided for many decades that a defendant who receives incorrect legal advice from a State official may raise an estoppel defense to a subsequent prosecution. The Washington legislature acted to impose an affirmative obligation on the judiciary of this state to notify defendants, orally and in writing, when they have lost the right to possess a firearm. This Court should enforce the legislature's directive and hold that, in the rare case where the sentencing court

fails to give the warnings, the State may not bring a prosecution for unlawful possession of a firearm without affirmatively establishing that the defendant had actual notice that his or her conduct was prohibited.

II. ARGUMENT

A. The legislature recently expanded the rights of noncitizens in Washington State to possess firearms.

In 2009 the Washington State legislature made significant changes to the firearm possession rights of noncitizens, providing noncitizens increased rights to lawfully possess firearms. Prior to the amendments, the law in Washington since 1911 required all noncitizens, including lawful permanent residents ("LPRs") of the United States (i.e. "Green card" holders), to obtain an alien firearms license. To procure such a license, the noncitizen was required to obtain a certificate from a consular officer stating that he or she does not have any disqualifying criminal offenses and including an attestation "that the alien is a responsible person." RCW 9.41.170(1) (2008). *See* Laws 2009, ch. 216, § 8 (repealing RCW 9.41.170).

This has been the law in Washington since 1911. Laws 1911, ch. 52, § 1. The legislature liberalized the requirements in

1994 by providing a route for noncitizens to obtain the permit even if they are unable to receive the consul's certification. The 1994 amendments also required, for the first time, that the noncitizen establish proof that "he or she is lawfully present in the United States." RCW 9.41.170(1) (2008). *Cf.* Laws 1911, ch. 52, § 1 (no such restriction). The amended statute permitted the noncitizen to seek a license by establishing lawful status, plus two years of residence in Washington and submitting to an additional background and fingerprint check. RCW 9.41.170(2)(a)-(b) (2008). Noncitizens who failed to procure the requisite license were subject to criminal prosecution for unlawful possession of a firearm pursuant to RCW 9A.41.040.

The legislature rewrote the statute entirely in 2009, repealing RCW 9.41.170 and replacing it with RCW 9.41.171, .173, .175. Unlike the former law, the new requirements permit all LPRs to possess a firearm on equal footing with a citizen, without the need to seek an alien firearms license. RCW 9.41.171(1). This is a significant departure from the prior statute, which for nearly a hundred years had prohibited even lawful residents from possessing a firearm without a license.

The newly-amended statute further provides a licensing regime for certain noncitizens who are in the United States lawfully, but are not permanent residents. These qualifying "nonimmigrants" may seek a license from the county sheriff for hunting or sport shooting, and the license "may not be denied" unless the applicant falls into a specific category prohibiting the approval of a license. RCW 9.41.173(2). A license may not be approved where the applicant "[i]s ineligible to possess a firearm under the provisions of RCW 9.41.040." RCW 9.41.173(2)(a).[1]

In addition to establishing (1) possession rights for lawful permanent residents without the need for an alien firearms permit and (2) providing a licensing procedure for certain other nonimmigrants, the legislature also provided an avenue for qualifying noncitizens who are lawfully present in the United States, but not Washington residents, to possess a firearm. *See* RCW 9.41.175. The statute permits such nonresidents foreign nationals to possess a firearm without first obtaining an alien firearms permit, provided they are lawfully present in the United States, have

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[1] Additional categories of individuals who are not eligible to receive a license include those subject to a court order prohibiting possession, individuals free on bond for a felony offense, and those with outstanding warrants. RCW 9.41.173(b)-(d).

complied with federal requirements permitting importation of firearms, and have a valid hunting license or an invitation to participate in a trade show or sport shooting event. RCW 9.41.175.

Thus, with these 2009 changes the legislature discarded the long-established licensing scheme that prohibited noncitizens, even LPRs, from possessing firearms without a license. In its place, the legislature now expressly permits LPRs to possess a firearm in the same manner as U.S. citizens, and provides a simple route for other qualifying nonimmigrants, even those who are not living in Washington, to legally possess firearms.

In light of these changes, the required court notice alerting a defendant of her or his ineligibility to possess firearms becomes particularly important. Not only do noncitizens, especially longtime LPRs, risk convictions under RCW 9.41.040 if determined to be unlawfully in possession of a firearm, they also risk the much harsher penalty of deportation from the United States if they are convicted. The mandatory warnings of RCW 9.41.047 are therefore of even greater importance to noncitizens, who face punishment much greater than the 13 month sentence given to the defendant here.

B. A conviction for unlawful possession of a firearm under RCW 9.41.040 carries serious immigration consequences for noncitizens.

A lawful resident of the United States may be deported when convicted of certain specified criminal offenses. *See* 8 U.S.C. § 1227(a)(2). Of particular relevance to the case at bar, a lawful resident who is found guilty of a "firearms offense" may be deported:

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, **possessing**, or carrying, . . . any weapon, part, or accessory which is **a firearm** or destructive device (as defined in section 921(a) of title 18, United State Code) **in violation of any law** is deportable.

8 U.S.C. § 1227(a)(2)(C) (emphasis added).

Of even greater concern to lawful permanent residents is the greatly-expanded federal definition of "aggravated felony" found at 8 U.S.C. § 1101(a)(43), which includes:

> an offense described in—
>
> (ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18, United States Code

8 U.S.C. § 1101(a)(43)(e).

In turn, § 922(g)(1) makes it unlawful "to ship or transport in interstate or foreign commerce, or to possess in or affecting

commerce, any firearm or ammunition" when a person "has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). The lack of an interstate commerce nexus does not prevent otherwise equivalent state statutes from being adjudged aggravated felonies.[2]

A conviction classified as an aggravated felony not only triggers deportation pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), it also prevents the immigration judge from granting discretionary relief from deportation known as "LPR Cancellation of Removal." *See* 8 U.S.C. § 1229a(a)(3) (providing deportation waiver, but excluding those convicted of an offense classified as an aggravated felony). As a result, deportation is often the only option, regardless of how long the LPR has resided in the U.S., the impact of deportation on her or his family and evidence of rehabilitation. *See* 8 U.S.C. § 1158(b)(2)(B)(i). Exile is mandatory and almost always permanent.

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[2] *See United States v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir.), *cert. denied*, 540 U.S. 925, 124 S. Ct. 332, 157 L.Ed.2d 226 (2003), *and United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir.), *cert. denied*, 534 U.S. 931, 122 S. Ct. 294, 151 L.Ed.2d 217 (2001). *Accord Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). *But see United States v. Alderman*, 565 F.3d 641, 646-47 (9th Cir. 2009) (questioning continued validity of Congressional felon-in-possession statutes reaching solely intrastate commerce), *reh'g denied*, 593 F.3d 1141 (2010), *cert. denied*, 131 S. Ct. 700, 178 L.Ed.2d 799 (2011).

See 8 U.S.C. § 1182(a)(9)(A)(ii) (indefinitely prohibiting granting visa to deported noncitizen who was convicted of an aggravated felony).

Unlawful possession of a firearm in the first and second degree are both deportable "firearms offenses" under § 1227(a)(2)(C). Additionally, unlawful possession of a firearm in the first degree under RCW 9.41.040(1) is categorically[3] an aggravated felony under § 1101(a)(43)(E). *Mendoza-Reyes*, 331 F.3d at 1122. Similarly, most convictions for unlawful possession of a firearm in

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[3] The categorical analysis requires the immigration court to analyze the elements of the "generic" federal offense and compare them to the elements of the state offense. Under this analysis there are three possible results: (1) every conviction under the state law would constitute a conviction under the federal law, regardless of the facts (a categorical match), (2) no conviction under the state law would be a conviction under the generic federal law (in which case, there are no immigration consequences) or (3) fact-specific. Under the third possibility, the immigration courts will look to the charging document, plea colloquy and judgment to determine if the state conviction matches the generic federal crime. *See generally United State v. Aguila-Montes de Oca*, __ F.3d __, 2011 WL 3506442 at *10 (9th Cir. Aug. 11, 2011).

the second degree under RCW 9.41.040(2) are aggravated felonies.[4]

As noted by the United States Supreme Court, "[t]hese changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010). As a result, "deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* (footnote omitted). *Accord State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011) ("Given the severity of the deportation consequences, we think Sandoval would have been rational to take his chances at trial.").

Even before *Padilla* the State of Washington evinced a concern that noncitizens be advised by the court that deportation

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[4] A conviction for second degree unlawful possession where the predicate offense is not a felony would not qualify as an aggravated felony. *See* RCW 9.41.040(2)(a)(i), (3). However, such a conviction remains a deportable firearms offense under 8 U.S.C. § 1227(a)(2)(C), requiring the LPR to seek the discretionary waiver of "Cancellation of Removal," which requires seven years of presence in the United States. 8 U.S.C. § 1229a(a)(2).

consequences can flow from a conviction when pleading guilty.[5] The requirement for a meaningful advisal of the disqualification to own a firearm that the Court of Appeals sought to uphold here is even more important given that the large majority of cases are resolved by a plea. In the case of noncitizens, the purpose of the general advisal mandated by RCW 10.40.200 is undermined if the actual notice required by RCW 9.41.047(1) is never received. The legislature has restored the right to have firearms to permanent residents and certain other legal noncitizens. This heightens the importance that a noncitizen defendant receive actual notice that her or his right to possess a firearm has been restricted.

This Court may find it useful to consider a specific case example to emphasize what is at stake for noncitizen defendants in order to emphasize the importance of the RCW 9.41.047 warnings. Mr. X is a noncitizen who came here when he was eight years old with his parents, who were fleeing persecution. When he was in college, he was charged with and pled guilty to felony theft and

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[5] "Our conclusion is not affected by whether Littlefair had or lacked a constitutional right to be advised of the deportation consequences of his plea. The legislature can create statutory rights not found in the constitution and it did that when it enacted RCW 10.40.200." *State v. Littlefair*, 112 Wn.App. 749, 765-766, 51 P.3d 116, 124 (2002), *rev. denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003).

served a short sentence. The sentencing court did not provide the required warnings under RCW 9.41.047. He disclosed his theft offense to the immigration service and received a waiver for the theft offense permitting him to become a lawful resident. *See* 8 U.S.C. § 1159(c). He is married to a U.S. citizen and has a U.S. citizen daughter who is seven.

Several years later, his friend invites him to come to a shooting range. Mr. X does not own any firearms, but joins his friend at the range and shoots a few rounds from his friend's licensed firearm. An off-duty police officer who is also at the range, recognizes Mr. X and realizes that he is a convicted felon. Mr. X is arrested and enters a guilty plea to unlawful possession of a firearm in the second degree under RCW 9.41.040(2)(a). Mr. X is now convicted of an aggravated felony and the immigration court has no discretion to "waive" his deportation based on the facts of his case due to his aggravated felony conviction. *See* 8 U.S.C. § 1229a(a)(3).

Noncitizen defendants face substantially greater penalties for unlawfully possessing a firearm than those faced by similarly-situated citizens. The warnings required by RCW 9.41.047 are therefore particularly significant to noncitizen defendants.

C. The legislature declared that all persons shall receive a warning of the loss of their right to possess a firearm and there must be a remedy for a plain violation of the statute.

The State repeatedly concedes, as it must, the legislature's direction that "the convicting or committing court shall notify the person, orally and in writing, that he may not possess a firearm unless his or her right to do so is restored by a court of record." Supp. Br. of Pet. At 8-9. *See* RCW 9.41.047(1)(a). But the State's proposed construction of the statute would render the law entirely meaningless. The Court should adopt Division II's reasoned rule requiring that a subsequent charge of unlawful possession must be dismissed where the predicate court fails to abide by the legislature's directive and the defendant lacked actual notice of the prohibition.

"The statute is unequivocal in its mandate." *State v. Minor*, 162 Wn.2d 769, ¶ 17, 174 P.3d 1162 (2008). The State's proposal to ignore violations of the advisal statute unless the defendant can establish that he was affirmatively misled would violate the cardinal principle that "[c]ourts are not permitted to simply ignore terms in a statute." *Parentage of J.M.K.*, 155 Wn.2d 374, ¶ 35, 119 P.3d 840 (2005). The State's proposal would ignore the statute because it

was the law *before* RCW 9.41.047 that misinformation from the Government regarding the right to possess a firearm may raise an estoppel defense to a subsequent prosecution. *See, e.g., United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987) ("The prosecution and conviction of Tallmadge for the receipt and possession of firearms, after he was misled by the government agent who sold him the weapons into believing that his conduct would not be contrary to federal law, violated due process."). *See Raley v. Ohio*, 360 U.S. 423, 437-438 (1959) (reversing contempt citations on basis of incorrect advice by state agent); *State v. Locati*, 111 Wn. App. 222, 228, 43 P.3d 1288 (2002) (collecting cases and finding estoppel claim possible in case involving pre-1994 predicate conviction, but rejecting claim on specific facts where defendant had actual knowledge that probation officer's advice was incorrect).

The State asks this Court to keep the law the same as it was before RCW 9.40.047 was enacted. But this Court may not ignore the legislature's pronouncement. It would be incongruous indeed if no consequences flow from a failure to abide by the legislature's directive that sentencing courts "shall" provide oral and written notice. We require all people present in Washington to follow the

law as passed by the legislature. The State and its judicial officers should be held to the same standard. "Relief consistent with the purpose of the statutory requirement must be available where the statute has been violated." *Minor*, 162 Wn.2d at ¶ 17.

Importantly, neither Division II nor the defendant before this Court are urging a *per se* rule as claimed by the State. Supp. Br. at 12. In the overwhelming majority of cases, the predicate sentencing court provides the necessary warnings, as evidenced by the fact that the legislature enacted this statute in 1994 and this Court has not considered this issue until now. In the relatively rare case where the *Washington* sentencing court[6] fails to give the warnings, the burden would shift to the State to establish that the defendant received actual notice of the prohibition. Where the defendant received actual notice, the failure to give the warnings is harmless. This proposed rule is consistent with the decisions of the Courts of Appeals addressing this issue. *See State v. Carter*, 127 Wn. App. 713, 720-721, 112 P.3d 561 (2005) (rejecting due process

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[6] The State's reliance on *State v. Blum*, 121 Wn. App. 1, 85 P.3d 373 (2004) (Supp. Br. at 11), and *State v. Stevens*, 137 Wn. App. 460, 153 P.3d 903 (2007), *rev. denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008) (Supp. Br. at 11), is misplaced as the predicate offense in those cases were not in Washington. The Washington legislature has no power to impose a duty on judges from other states so RCW 9.41.047 does not apply.

challenge to unlawful possession prosecution where defendant received warnings during sentencing for second predicate felony).

III. CONCLUSION

The legislature has seen fit to substantially liberalize firearm possession rights for noncitizens. Yet, unlawfully possessing a firearm has severe consequences for noncitizens which are not present for citizens. The Court should take cognizance of this fact in reaching a decision on this case.

On the merits, amicus urges the Court to enforce the legislature's requirement that the predicate sentencing court provide oral and written warnings. In the rare case where the warnings are not provided, the State must establish that the defendant had actual knowledge of the prohibition in order to successfully prosecute for unlawful possession. Otherwise, lack of actual notice of illegality exposes lawful permanent residents to life-long consequences much harsher than that of a felony conviction, and undermines the plain intent of the legislature.

Respectfully submitted this 9th day of September, 2011.

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